

MUNICIPAL HOME RULE IN OHIO SINCE 1960

JOHN E. GOTHERMAN*

The scope of an article dealing with municipal home rule in Ohio probably bears a direct relationship to the temerity of its author. Sixty years after the adoption of the Ohio home rule amendment¹ and after hundreds of cases have been decided, it would be a colossal task to undertake a comprehensive review of municipal home rule. To review the twelve years since 1960 is a more modest task but some review of the basic principles and landmark cases prior to 1960 is still necessary. With respect to the latter, this article will only highlight the development of the case law and political science of municipal government prior to 1960. For greater detail the dedicated scholar can examine the several excellent law review articles covering the pre-1960 era.² This article will also omit utility powers under the home rule amendment.³

I. PRE-HOME RULE

In order to understand the structure of municipal government as it exists today in Ohio, it is necessary to briefly review its historical development. Prior to 1851 the underlying and controlling principle of municipal government in Ohio relegated Ohio municipal corporations to a status as creatures of the state government. The state legislature individually "chartered" each municipal or public corporation. In other words the General Assembly provided the form, organization and structure of each municipality in a special act which also provided for the powers and functions of the municipality. Since a separate act was passed for each municipality, the form of government and powers of each municipality varied. As the state's population increased and urban areas developed, the amount of special municipal legislation became burdensome.

In response to the growing problem of diverse municipal governments, the constitution of 1851 provided "The General Assembly, shall provide for the organization of cities and incorporated villages, by general laws.

* Member of the Ohio Bar; the author wishes to acknowledge the assistance of Craig E. Evans, The Ohio State University College of Law.

¹ OHIO CONST. art. XVIII.

² See generally Crawford, *Restraints on Municipal Indebtedness In Ohio*, 21 OHIO ST. L.J. 331 (1960); Duffey, *Non-Charter Municipalities: Local Self-Government*, 21 OHIO ST. L.J. 304 (1960); Farrell, *Municipal Public Utility Powers*, 21 OHIO ST. L.J. 390 (1960); Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18 (1948); Glander, *Analysis and Critique of State Pre-emption of Municipal Excise and Income Taxes under Ohio Home Rule*, 21 OHIO ST. L.J. 343 (1960); Seasongood, *Cincinnati and Home Rule*, 9 OHIO ST. L.J. 98 (1948); Walker, *Municipal Government in Ohio before 1912*, 9 OHIO ST. L.J. 1 (1948).

³ For a comprehensive analysis of utilities regulation under the home rule amendment, see Vaubel, *Of Concern to Painesville—Or Only to the State: Home Rule in the Context of Utilities Regulation*, 33 OHIO ST. L.J. 257 (1972).

..."⁴ Section 1 of article XIII of that constitution provided, "The General Assembly shall pass no special act conferring corporate powers."⁵ From these provisions it is obvious that the intent was to prohibit the type of special legislation which gave rise to so many inequities. However, the legislature soon established classes and grades of cities according to population, and the result was the same as that produced by creating municipal corporations by special act.

In 1902 two cases were decided that marked the end of legislative classification for Ohio municipalities,⁶ causing considerable furor within the state. Ohio's cities and villages were faced with the prospect of having no municipal organization unless action were taken immediately. The governor convened a special session of the legislature and S.B. No. 1 of that special session was enacted providing for the organization of cities and villages. To carry into effect the powers and duties conferred and imposed upon then existing councils and other bodies, to provide the procedures for conducting the first election to be held under the new statutes, and to provide for the change in the organization of municipalities, the act took effect November 15, 1902. For all other purposes the act was effective on the first Monday in May 1903.

Statutorily planned cities and villages still follow much of the organizational pattern established by the special session of the Ohio General Assembly in 1902. Of course there have been many amendments over the years, but the basic framework remains substantially unchanged. As created by the state government, municipal power in Ohio prior to home rule is well described by Judge Dillon's rule:

It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers and no others: First, those granted in the express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.*⁷

The effect of Dillon's rule was to deny power to municipalities except as conferred by the state legislature. That power was meager and the stage was set for the revolutionary change which came in 1912 by means of a constitutional amendment. Professor Harvey Walker's research of the debates of the Constitutional Convention of Ohio reveals much of the rationale behind the home rule amendment:

⁴ OHIO CONST. art. XIII, §6 (1851).

⁵ *Id.*

⁶ State *ex rel.* Knisely v. Jones, 66 Ohio St. 453, 64 N.E. 424 (1902); State v. Beacom, 66 Ohio St. 491, 64 N.E. 427 (1902).

⁷ 1 DILLON, MUN. CORP. §237 (5th ed. 1911).

Professor Knight explained that the proposal was designed to accomplish three things: (1) to make it possible for different cities in the state of Ohio to have, if they so desire, different forms and types of municipal organization; (2) to get away from the rule that municipal corporations shall be held strictly within the limit of the powers granted by the legislature and adopt the rule that cities shall have power to do all things with reference to local government that are not prohibited; and (3) to clarify and expand the power of municipalities to acquire and operate public utilities. "The proposal does not undertake," he said, "to detach cities from the state, but it does undertake to draw as sharply and as clearly as possible the line that separates general state affairs from the business which is peculiar to each separate municipality."⁸

On September 3, 1912, the electors of Ohio approved article XVIII of the Ohio constitution—the home rule amendment, thus, making 1912 a landmark year in Ohio municipal government.

II. HIGHLIGHTS: 1912 TO 1960

A. *Summary of Home Rule Amendment*

Section 1 of the amendment provides:

Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law.⁹

Section 2 of article XVIII provides that general laws shall be passed to provide for the incorporation and government of cities and villages. Pursuant to this constitutional mandate, the legislature has provided for the incorporation of villages;¹⁰ however, provision has not been made for the incorporation of a municipality as a city. For this reason all newly incorporated municipal corporations begin their existence as villages, regardless of population at the time of incorporation.

The constitution specifically provides that the legislature shall regulate the transition from village to city. The legislature has provided three methods by which villages may attain city status. First, every ten years the Bureau of the Census, U. S. Department of Commerce, conducts a population census. After each decennial census the Secretary of State issues proclamations for each municipal corporation. Those with a population of 5,000 or more are proclaimed cities and those with a population of less than 5,000 are proclaimed villages. A copy of the proclamation is then sent to the mayor of the municipal corporation who must read it before the legislative authority of the municipality. Thirty days after the issuance of the proclamation, the municipal corporation becomes a city or

⁸ Walker, *supra* note 2, at 13-14.

⁹ OHIO CONST. art. XVIII, § 1.

¹⁰ OHIO REV. CODE ANN. §§ 707.01-707.30 (Page 1954).

village, as the case may be.¹¹ Second, a village may attain city status, or a city may revert to village status, after a special federal census.¹² Third, any village which at the preceding general election had at least 5,000 resident electors registered with the county board of elections or which had at least 5,000 resident electors voting in such general election, becomes a city. The board of elections immediately certifies to the Secretary of State the number of resident electors registered or voting, the Secretary of State, upon receiving this certification, issues a proclamation declaring that village to be a city, a copy of the proclamation is sent to the mayor of the municipal corporation, this copy is transmitted and read to the legislative authority of the village, and thirty days after the issuance of the proclamation the village becomes a city.¹³

Section 2 of article XVIII further provides that additional laws may be *passed* "for the government of municipalities adopting same," but that such additional laws shall not become *operative* until each has been submitted to the electors of the municipality and approved by a majority vote. The General Assembly has provided for three alternative forms of government that may be adopted.¹⁴

Section 3 of article XVIII is the heart of the home rule amendment:

Municipalities shall have authority to exercise all powers of local self-government, and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.¹⁵

Sections 4, 5, 6, and 12 deal with the acquisition, operation and control of municipally owned utilities. The authority for municipalities to adopt and amend charters is found in §§ 7, 8 and 9. This grant of power liberated Ohio municipalities from the state's control over the form of municipal government to be employed. This power has been most useful to cities and villages, allowing them to adopt the form of government, which local citizens feel best meets the local political, social and economic needs. Article XVIII, § 10 deals with the power of municipal corporations to acquire private property for public uses. Section 11 relates to assessments for the cost of appropriations. Section 12 pertains to bonds for municipal utilities, § 13 limits the power of municipalities to incur debt and levy taxes, and § 14 relates to elections provided for in article XVIII.

B. *Section 3, Article XVIII*

One of the first points of argument which developed over the home

¹¹ OHIO REV. CODE ANN. § 703.06 (Page 1954).

¹² *Brubaker v. Brown*, 163 Ohio St. 241, 126 N.E.2d 439 (1955).

¹³ OHIO REV. CODE ANN. § 703.06 (Page 1954).

¹⁴ OHIO REV. CODE ANN. §§ 705.41-705.86 (Page 1954).

¹⁵ OHIO CONST. art. XVIII, § 3.

rule amendment was whether § 3 was self executing or whether it required the legislature to act in order to make home rule powers available to municipalities. An early case, *State ex. rel. Toledo v. Lynch*,¹⁶ held a charter to be a prerequisite to the exercise of the home rule powers under § 3. In *Perrysburg v. Ridgeway*,¹⁷ however, the supreme court overruled *Lynch*, holding that all municipalities derive their powers of local self government directly from the constitution. The court held the grant of powers to be self executing and not dependent upon legislation or the adoption of a charter.¹⁸

John J. Duffey, in his article on non-charter municipalities, said:

The key provision of article XVIII is section 3. To facilitate analysis and discussion it can be broken into three parts:

(Clause 1) "Municipalities shall have authority to exercise all powers of local self-government"

(Clause 2) "and to adopt and enforce within their limits such local police, sanitary and other similar regulations,"

(Clause 3) "as are not in conflict with general laws."

The first major issue in interpreting section 3 is the question of the application of the "conflict" clause. Does it modify only the grant of police powers or does it qualify the entire grant, *i.e.*, powers of "local self-government" and "police" powers?¹⁹

In *Fitzgerald v. Cleveland*²⁰ the supreme court associated the "conflict" clause exclusively with the police power (clause 2). A later decision, *State, ex. rel. Canada v. Phillips*,²¹ seems to have finally settled the question. In the fourth syllabus of *Canada* the supreme court held:

The words, "as are not in conflict with general laws" found in Section 3 of Article XVIII of the Constitution, modify the words "local police, sanitary and other similar regulations" but do not modify the words "powers of local self-government."²²

C. Section 2, Article XVIII

Section 2, article XVIII, authorizes the adoption of general laws for the following purposes:

¹⁶ 88 Ohio St. 71, 102 N.E. 67 0 (1913).

¹⁷ 108 Ohio St. 245, 140 N.E. 595 (1923).

¹⁸ 1. Since the Constitution of 1912 become operative, all municipalities derive all their "powers of local self-government" from the Constitution direct, by virtue of Section 3, Article XVIII, thereof.

...

3. The above constitutional grant of power to municipalities is "self-executing," in the sense that no legislative action is necessary in order to make it available to the municipalities.

Id. at 245, 140 N.E. at 595.

¹⁹ Duffy, *supra* note 2, at 308.

²⁰ 88 Ohio St. 338, 103 N.E. 512 (1913).

²¹ 168 Ohio St. 191, 151 N.E.2d 722 (1958).

²² *Id.* at 191, 151 N.E.2d at 724.

- (1) The incorporation of cities and villages.
- (2) The establishment of alternative statutory forms of government which have been approved by a vote of the people.
- (3) The government of cities and villages.

In the exercise of its authority, the General Assembly has provided for the incorporation of villages but not of cities.²³ Chapter 705 of the Ohio Revised Code provides three alternative statutory forms of government that may be adopted by the electors: (1) the Commission Plan, (2) the City Manager Plan, and (3) the Federal plan, which is a strong mayor form of government. Once adopted they may be changed by a special election.²⁴

Section 2 of article XVIII is also the basis for the statutory form of government for non-charter municipalities. Title 7, Ohio Revised Code, in its several chapters, fulfills the third goal of § 2 by providing the basic form of government for general statutory cities and villages. The general statutory plan for cities is a weak mayor form of government, for non-charter villages, a combination of a weak mayor form and a commission plan in which the council shares administrative functions with the mayor.

In the landmark case of *Morris v. Roseman*²⁵ the court held that procedures to be followed by non-charter municipalities are clearly controlled by the statutes. In this case the non-charter village of Oakwood passed a zoning ordinance as an emergency measure. The statutes required a public hearing and a 30-day notice of the time and place of the hearing, but the village contended that it possessed the authority, under § 3 of article XVIII, to adopt an emergency zoning ordinance as a power of local self government. The supreme court chose to limit the applicability of the constitutional powers, held by local self governments over statutory enactments, to "substantive powers" as distinguished from matters of "structure and procedure." Judge Zimmerman made this distinction very clear in stating how the substantive power of zoning was to be exercised:

The Constitution of Ohio provides two ways. By Section 2, Article XVIII, a mandatory duty is placed upon the General Assembly to enact laws for the incorporation and government of cities and villages, and Section 7, Article XVIII, grants a municipality the option of determining its own plan of local self-government by framing and adopting a charter. If a municipality adopts a charter it thereby and thereunder has the power to enact and enforce ordinances relating to local affairs, but, if it does not, its organization, and operation are regulated by the statutory provisions covering the subject.

In other words, by Sections 3 and 7 of Article XVIII of the Constitution, a municipality has the power to govern itself locally in certain re-

²³ OHIO REV. CODE ANN. §§ 707.01-707.30 (Page 1954).

²⁴ OHIO REV. CODE ANN. § 705.30 (Page 1954).

²⁵ 162 Ohio St. 447, 123 N.E.2d 419 (1954).

spects. The statutes in no way inhibit such power but merely prescribe an orderly method for the exercise of such power where the municipality has not adopted a charter and set up its own governmental machinery thereunder.²⁶

Professor Duffey accurately states the impact of *Morris v. Roseman* on charter municipalities:

Under *Morris* the procedure for enacting an ordinance is a matter of "government" under section 2 and not a matter of "local self-government" under section 3. Therefore, a charter municipality's power to establish its own enactment procedure would logically be derived from section 7—the power to adopt "a charter for its government." The opinion in *Morris* appears to so state, although on its facts that is clearly not a holding. On this approach, the charter does act as a *grant* with respect to enactment procedure, and as a *limitation* with respect to section 3 "substantive" powers.²⁷

III. DEVELOPMENTS SINCE 1960

A. All Powers of Local Self Government— Sections 2 and 3, article XVIII

In 1960, *State ex rel. Petit v. Wagner*,²⁸ one of the most troublesome home rule cases, was decided; Professor Duffey's article²⁹ devotes several pages to a discussion of this case and points out that the rationale of *Petit* is difficult to reconcile with *Canada v. Phillips*. In *Petit*, Judge Peck said:

This court has thus clearly recognized the distinction between the powers of charter and non-charter municipalities [a reference to *Morris v. Roseman* and *Canada v. Phillips*]. Clear evidence of the intention that such a distinction should exist is found in the very fact that the two provisions of the Constitution hereinabove cited [an apparent reference to §§ 3 and 7] were adopted as separate sections; if an identical extent of authority had been intended to have been conferred, a single section would have abundantly sufficed. By these two sections, the Constitution confers upon charter cities and villages some greater degree of power not here required to be defined but limits the general area of non-charter municipal authority. There is in the present case a direct variance between the statute permitting only members of a police department to take an examination of the type here under consideration and the ordinance which contains no such limitation, and it is our conclusion that such variance renders the ordinance invalid. Differently stated, a non-charter municipality is without authority under the provisions of Section 3, Article XVIII of the Constitution, to prescribe less restrictive qualifications for civil-service-examination [*sic*] applicants than are prescribed by statute, since such municipal action would be at variance with the general laws.³⁰

²⁶ *Id.* at 450, 123 N.E.2d at 422.

²⁷ Duffey, *supra* note 2, at 320.

²⁸ *State ex rel. Petit v. Wagner*, 170 Ohio St. 297, 164 N.E.2d 574 (1960).

²⁹ Duffey, *supra* note 2, at 321-2.

³⁰ 170 Ohio St. at 303-4, 164 N.E.2d at 578.

Petit v. Wagner could logically be explained as an extension of the form of government procedure theory of *Morris v. Roseman*. But the last sentence of the above quotation seems definitely to state that § 3 (dealing with powers of local self government) and not § 2 (dealing with structure and procedure) is the basis for invalidating a local ordinance that is at variance with the general law. This view of Judge Peck's opinion would seem to erode almost totally the doctrine of *Perrysburg v. Ridgeway*, which held that all powers of local self government are extended to both charter and non-charter municipalities. The only local self government powers which are left open to non-charter municipalities under this view would be those areas not covered by a statute.

In the case of *Leavers v. Canton*³¹ Judge O'Neill summarized the court's view of the application of § 3, article XVIII, to charter and non-charter cities and villages:

Any ordinance dealing with police regulations passed by either a charter or noncharter city, which is at a variance with state law, is invalid. Section 3, Article XVIII of the Ohio Constitution.

An ordinance passed by a charter city, which is not a police regulation but which deals with local self-government, is valid and effective even though it is at a variance with a state statute. . . .

An ordinance passed by a noncharter city, which is not a police regulation but is concerned with local self-government regulation, is valid where there is no state statute at a variance with the ordinance. . . .

An ordinance passed by a noncharter city, which is not a police regulation but is concerned with local self-government, is invalid where such ordinance is at a variance with state statute. . . .³²

Chief Justice Taft, in his concurring opinion to the *Leavers* decision, would have supplied the final blow to the doctrine of *Perrysburg v. Ridgeway*. He said that "as to noncharter municipalities, exercises of powers of self government pursuant to Section 3 must be consistent with laws enacted for their government pursuant to Section 2."³³

Both *Petit* and *Leavers* involved local efforts by non-charter cities to avoid state laws imposing civil service procedures; *Petit* involved an appointment, and *Leavers* the removal or termination of services. The result of these cases could have been reached on a theory that such matters were procedural in nature and, under the holding of *Morris v. Roseman*, § 2 authorized the legislature to adopt the procedures for civil service in non-charter cities. In this author's opinion the durability of the rationale of *Petit v. Wagner* will not be known until it is considered in the context of a non-civil service case. *Union Sand and Supply Corp. v. Fairport*,³⁴

³¹ 1 Ohio St. 2d 33, 203 N.E.2d 354 (1964).

³² *Id.* at 37, 203 N.E.2d at 356-57 (citations omitted).

³³ *Id.* at 38, 203 N.E.2d at 357 (Taft, C.J., concurring).

³⁴ 172 Ohio St. 387, 176 N.E.2d 224 (1961). This case involved the non-charter village of Fairport Harbor.

a case involving a non-charter village and decided in the period between the *Petit* and *Leavers* cases, tends to support this opinion. In *Union Sand* Judge Zimmerman said:

Of course, the state law (Section 5577.04 *et seq.*, Revised Code, relating to maximum loads) is operative generally, but it does not inhibit the exercise of the powers of local self-government by municipalities in the reasonable regulation as to weights of vehicles passing over their thoroughfares.³⁵

The court did not here use the theory of *Petit v. Wagner* to invalidate the municipal ordinance, even though there was a clear variance with a statute. The opinion does not discuss the rationale of *Petit*, but the two cases are surely inconsistent, and the inconsistency could be used as the basis for a reconsideration of the *Petit* and *Leavers* cases.

Municipalities are granted all powers of local self government under § 3, but only as to those matters relating to the government and administration of the internal affairs of the municipality. Accordingly, the detachment of territory from a municipality was held not to fall within the sphere of local self government, but to be a subject requiring a uniform procedure throughout the state and, therefore, within the exclusive control of the General Assembly.³⁶ Thus the court adopted the following test to define the limits of local self government:

To determine whether legislation is such as falls within the area of local self-government, the result of such legislation or the result of the proceedings thereunder must be considered. If the result affects only the municipality itself, with no extra-territorial effects, the subject is clearly within the power of local self-government and is a matter for the determination of the municipality. However, if the result is not so confined it becomes a matter for the General Assembly.³⁷

This result was consistent with an earlier decision involving the validity of an order of the State Department of Health to the City of Bucyrus to install a sewerage system.³⁸ It was in the *Bucyrus* case that the court introduced the "state-wide concern" doctrine:

It is a matter of concern to the whole state whether a municipality so dispose of its sewage as to breed disease within the municipality, for the municipality is of the public of the state; and it is equally a matter of concern to the whole state whether a municipality so dispose of its sewage as to breed disease without and in the vicinity of its own territory, and whether, having bred disease in either situation, it disseminate it throughout the state.³⁹

³⁵ *Id.* at 391, 176 N.E.2d at 226.

³⁶ *Beachwood v. Board of Elections*, 167 Ohio St. 369, 148 N.E.2d 921 (1958).

³⁷ *Id.* at 371, 148 N.E.2d at 923.

³⁸ *Bucyrus v. State Dep't. of Health*, 120 Ohio St. 426, 166 N.E. 370 (1929).

³⁹ *Id.* at 427-29, 166 N.E. at 371.

In 1968 the supreme court held a state statute authorizing the construction of inter-city electric lines free from local regulation to be valid, the case being *Cleveland Electric Illuminating Co. v. Painesville*.⁴⁰ The court there adopted the test set forth in *Bucyrus* to determine what constitutes a matter of "state-wide concern." The decision written by Judge Matthias stated:

Thus, even if there is a matter of local concern involved, if the regulation of the subject matter affects the general public of the state as a whole more than it does the local inhabitants the matter passes from what was a matter for local government to a matter of general state interest.

As was said in the opinion in *State, ex rel. McElroy v. Akron*, 173 Ohio St. 189, 192:

"Due to our changing society, many things which were once considered a matter of purely local concern and subject strictly to local regulation, if any, have now become a matter of statewide concern, creating the necessity for statewide control."⁴¹

It is therefore clear that the so-called "state-wide concern doctrine" remains viable.

B. Police Power of Municipalities

In addition to granting all powers of local self government, § 3 of article XVIII grants municipalities the power "to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."⁴² In an early case, *Struthers v. Sokol*,⁴³ the court spelled out the test for determining when a conflict with the general laws exists. The syllabi of *Struthers* remain a helpful guide in interpreting the conflict clause of § 3.

1. In determining whether an ordinance is in "conflict" with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.

2. A police ordinance is not in conflict with a general law upon the same subject merely because certain specific acts are declared unlawful by the ordinance, which acts are not referred to in the general law, or because certain specific acts are omitted in the ordinance but referred to in the general law, or because different penalties are provided for the same acts, even though greater penalties are imposed by the municipal ordinance.⁴⁴

While municipal ordinances that conflict with general laws are invalid, not all state statutes are general laws within the meaning of § 3. The case of *West Jefferson v. Robinson*⁴⁵ involved the validity of a Green

⁴⁰ 15 Ohio St. 2d 125, 239 N.E.2d 75 (1968).

⁴¹ *Id.* at 129, 239 N.E.2d at 78.

⁴² OHIO CONST. art. XVIII, § 3.

⁴³ 108 Ohio St. 263, 140 N.E. 519 (1923).

⁴⁴ *Id.* at 263-64, 140 N.E. at 519-20.

⁴⁵ 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965).

River ordinance which made it a misdemeanor for an itinerant merchant or a transient vendor to go uninvited on private property to solicit sales. The defendant relied upon the conflict clause in his attempt to invalidate the ordinance, arguing that although the statutes authorized municipalities to grant licenses, they also provided certain exceptions from the power to license. The defendant's business came within one of the exceptions. In the syllabus the supreme court held:

3. The words "general laws" as set forth in Section 3 of Article XVIII of the Ohio Constitution means [*sic*] statutes setting forth police, sanitary or similar regulations and not statutes which purport only to grant or to limit the legislative powers of a municipal corporation to adopt or enforce police, sanitary or other similar regulations.⁴⁶

In other words, the court here recognized that there are two types of statutes. One type directly establishes police, sanitary or similar regulations applicable to the general public, and the court defines this type as a "general law." The second type directly regulates the police, sanitary or similar regulations promulgated by municipal corporations, and the court defines this type as *not* "general law."

The *West Jefferson* case followed a previous holding, *Youngstown v. Evans*,⁴⁷ which struck down § 715.67 of the Ohio Revised Code, a statute limiting the maximum punishment that may be imposed by municipal ordinance to a fine of \$500 or six months imprisonment. In *Youngstown*, Chief Justice Marshall stated that the statute ". . . is not a general law in the sense of prescribing a rule of conduct upon citizens generally. It is a limitation upon law making by municipal legislative bodies."⁴⁸ Thus, the case law is now settled that in order to be a general law under the conflict clause of § 3, the state must be exercising its police power in a substantive way and not merely enacting a statute to limit or prohibit the exercise of police power by municipalities.

Another significant case, *Auxter v. Toledo*,⁴⁹ was decided in 1962. The plaintiff operated a beer and wine carry out under a state license. Toledo passed an ordinance prohibiting the sale of beer without a city license. The court held that the Toledo ordinance conflicted with a state statute. Judge Taft said, "Even though plaintiff has a state license authorizing him to carry on the business of selling beer in Toledo, the ordinance prohibits him from doing so if he does not pay for and secure a municipal license to do so."⁵⁰ The ordinance was thus declared invalid as in conflict with a general law.

In a similar case decided earlier the same year, the supreme court held

⁴⁶ *Id.* at 113, 205 N.E.2d at 383.

⁴⁷ 121 Ohio St. 342, 168 N.E. 844 (1929).

⁴⁸ *Id.* at 345, 168 N.E. at 845.

⁴⁹ 173 Ohio St. 444, 183 N.E.2d 920 (1962).

⁵⁰ *Id.* at 447, 183 N.E.2d at 923.

that the state had pre-empted the power of municipalities to license watercraft.⁵¹ In deciding this case Judge Radcliffe, relying on a well-known case involving the pre-emption doctrine as applied to the power of taxation of municipalities, said:

We having determined the facts that the state license constitutes an excise tax, and that the state properly entered the field, it necessarily follows that the state has pre-empted the field, and municipalities can no longer levy a license tax on watercraft. *Haefner, a Taxpayer v. City of Youngstown*, 147 Ohio St. 58.⁵²

In the syllabus to the case, the statute was referred to as "a valid exercise of the police power by the state."⁵³ If state boat licensing were an exercise of the state's police power, rather than its power of taxation, the court's holding should have been based on the conflicts clause of § 3, article XVIII, rather than on pre-emption—a doctrine applicable only to taxation.

In the case of *Anderson v. Brown*,⁵⁴ the court followed its prior decision of *Auxter v. Toledo*, holding in the syllabus that:

3. A license for the operation of a house trailer park issued by the district board of health pursuant to Section 3733.06, Revised Code, gives the person to whom it is issued the right to operate such a park, and a municipal ordinance which prohibits the operation of such a park within the limits of the municipality without a municipal license, which is obtainable only upon paying a fee, is in conflict with Section 3733.06, Revised Code: (*Auxter v. Toledo*, 173 Ohio St. 444, approved and followed. Section 3733.06, Revised Code, and Section 3, Article XVIII of the Ohio Constitution, construed and applied.)⁵⁵

It is clear that where the state has exercised its police power through licensing, a municipal exercise of police power by licensing at the local level results in a conflict under § 3, and the municipal licensing measure is, therefore, invalid. However the court has rejected the argument that comprehensive regulation and licensing of the sale of liquor by the state has pre-empted municipalities in the field of regulation. In *Cleveland v. Raff*⁵⁶ Judge O'Neill said: "While pre-emption by implication has been held to exist in the area of state and local taxation . . . considerations of double taxation and tax sharing between the state and municipalities motivated the implication of pre-emption. . . . These factors, however, are not relevant here."⁵⁷

⁵¹ State *ex rel.* McElroy v. Akron, 173 Ohio St. 189, 181 N.E.2d 26 (1962).

⁵² *Id.* at 195, 181 N.E.2d at 30.

⁵³ *Id.* at 189, 181 N.E.2d at 27.

⁵⁴ 13 Ohio St. 2d 53, 233 N.E.2d 584 (1968).

⁵⁵ *Id.* at 54, 233 N.E.2d at 586.

⁵⁶ 13 Ohio St. 2d 112, 235 N.E.2d 138 (1968).

⁵⁷ *Id.* at 115, 235 N.E.2d at 141.

A municipal ordinance that makes an offense a misdemeanor is in conflict with a statute that makes the same offense a felony.⁵⁸ However, when the only difference between a municipal ordinance and a state statute proscribing conduct and providing punishment is in the severity of punishment (both being misdemeanors), there is no conflict under § 3.⁵⁹

C. *Welfare of Employees—Section 34, Article II*

It is clear from case law that other provisions of the Ohio constitution may limit the home rule powers of municipalities. Section 34 of article II provides:

Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power. . . .⁶⁰

The creation and the administration, management, and control of a state police and firemen's disability and pension fund, as provided in §§ 742.01 to 742.49, inclusive, of the Revised Code has been held to be a valid enactment of the General Assembly by virtue of § 34, article II of the constitution of Ohio.⁶¹ The recent *Pension Fund* case may prove to be an important precedent for upholding a state imposed system of collective bargaining between municipalities and labor organizations, when such statutes are enacted.

D. *Municipal Charters*

A recent amendment to § 9, article XVIII, approved at the November, 1970, election, permits notice of charter amendments to be given by (1) mailing copies of the proposed amendments to the electors not less than 30 days prior to the election, or (2) newspaper advertising pursuant to laws passed by the General Assembly. Under the prior section all amendments were required to be mailed and newspaper advertising was not permitted. Since the new provision permitting newspaper advertising was not self-executing, a statute was enacted which provided for newspaper notice of charter amendments to be made as follows:

(B) The full text of the proposed charter amendment shall be published once a week for not less than two consecutive weeks in a newspaper published in the municipal corporation, with the first publication being at least fifteen days prior to the election at which the amendment is to be submitted to the electors. If no newspaper is published in the municipal

⁵⁸ *Cleveland v. Betts*, 168 Ohio St. 386, 154 N.E.2d 917 (1958).

⁵⁹ *Toledo v. Best*, 172 Ohio St. 371, 176 N.E.2d 520 (1961).

⁶⁰ OHIO CONST. art II, § 34.

⁶¹ *State ex rel. Bd. of Trustees of Pension Fund v. Board of Trustees of Relief Fund*, 12 Ohio St. 2d 105, 233 N.E.2d 135 (1967).

corporation, then such publication shall be made in a newspaper of general circulation within the municipal corporation.⁶²

Municipalities having charters that recite or paraphrase the previous constitutional language requiring mail notice of charter amendments may be required to amend their charters before they can take advantage of the less expensive newspaper notice, because the charter itself has determined which of the two alternatives shall be followed.

The increase, by charter amendment, of an incumbent mayor's term from two to four years does not constitute a retroactive law as that term is used in § 28, article II, of the Ohio constitution. Further, a board of elections may not refuse to place a charter amendment on the ballot because it believes that the amendment would be illegal.⁶³

Section 1 (f) of article II of the Ohio constitution provides:

The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.⁶⁴

The charter of the City of Oxford exempted ordinances raising revenue from the application of referendum procedures. A mandamus action was filed in the supreme court to require the city to submit an ordinance which levied an income tax to a referendum vote.⁶⁵ In his opinion Judge Leach said:

Essentially, we have held that Section 1f of Article II (as contrasted to Section 1d of Article II) is not "self-executing"; that *either* the General Assembly, by the enactment of statutory "law," or the people of the municipality, by the adoption of charter "law" under the "home rule" provisions of the Constitution, may exempt certain classes of laws from the operation of the referendum, if "the laws so to be exempted comply as to their character to the provisions of Section 1d of Article II" (*Shyrock, supra*, page 384); that charter provisions, if so adopted, will apply (*Dillon, supra*, paragraph three of the syllabus); R.C. 731.41; and that where there are no charter provisions the exercise of such power is only as provided for by the General Assembly (*Dubyak, supra*, paragraph one of the syllabus).⁶⁶

In 1930 the court held in *Phillips v. Hume*⁶⁷ that the requirements for advertising and bidding, as set forth in the general laws, must be followed by charter cities because they were a limitation on the debt power of

⁶² OHIO REV. CODE ANN. § 731.211(B) (Page Supp. 1971).

⁶³ State *ex rel.* McGovern v. Board of Elections of Cuyahoga County, 24 Ohio Misc. 135 (1970).

⁶⁴ OHIO CONST. art II, § 1(f).

⁶⁵ State *ex rel.* Bramlette v. Yordy, 24 Ohio St. 2d 147, 265 N.E.2d 273 (1970).

⁶⁶ *Id.* at 149, 265 N.E.2d at 274. Citations to cases included in this quotation are: *Shyrock v. Zanesville*, 92 Ohio St. 375, 110 N.E. 937 (1915); *Dillon v. Cleveland*, 117 Ohio St. 258, 158 N.E. 606 (1927); *Dubyak v. Kovach*, 164 Ohio St. 247, 129 N.E.2d 809 (1955).

⁶⁷ 122 Ohio St. 11, 170 N.E. 438 (1930).

municipalities under § 6, article XIII, and § 13, article XVIII, of the Ohio constitution. In *State ex rel. Cronin v. Wald*⁶⁸ the court overruled *Phillips v. Hume*. In this landmark case Judge Stern stated:

Although the General Assembly can, under the provisions of Section 13, Article XVIII, and Section 6, Article XIII, of the Ohio Constitution, limit a municipality's aggregate indebtedness, it may not, under those sections, prescribe the *manner and method* which a municipal corporation must follow in setting the actual monetary amount of expenditures which could be made without councilmanic authorization. As R.C. §§ 715.18 and 735.05 do specify such a procedure, among other requirements, they are not debt limitations within the meaning of those constitutional provisions. If a city charter provision pertaining to the procedure for limiting the amount of money which a city may contract to expend conflicts with a state law, the charter provision prevails as a valid exercise of the home rule power.⁶⁹

Charter cities and villages are free to provide monetary limitations for bidding on municipal contracts without regard to the statutory limitations under *Cronin*.

Other cases involving municipal charters and the home rule amendment, decided since 1960, have held the following: A municipal charter requiring an opportunity for competition in the sale of real property limits the power granted by § 3 to exercise all powers of local self government, including the power to sell real property not needed for municipal purposes;⁷⁰ the mayor of a charter city does not have the authority to veto an ordinance which submits a proposed amendment to that charter to the electors, since § 9 provides the only valid procedure for submission of a charter amendment.⁷¹ This is consistent with the theory that all charter provisions which establish procedures for amending charters different from those provided by the constitution—such as authority for a charter review commission to submit amendments to a vote—are invalid; a charter provision authorizing group petitions for council candidates is proper, since municipal elections are a matter of local concern.⁷² A municipal charter may distribute legislative powers among the various municipal bodies and officers other than the council because the doctrine of separation of powers is not applicable to charter cities, and thus a charter may also invest more than one municipal body with both legislative and executive powers and duties.⁷³ A charter provision may authorize salary increases during the term of elected offices,⁷⁴ and a charter may authorize the city man-

⁶⁸ 26 Ohio St. 2d 22, 268 N.E.2d 581 (1971).

⁶⁹ *Id.* at 27, 268 N.E.2d at 584-85.

⁷⁰ *Young v. Dayton*, 12 Ohio St. 2d 71, 232 N.E.2d 655 (1967).

⁷¹ *Bellington v. Corner*, 25 Ohio St. 2d 140, 267 N.E.2d 410 (1971).

⁷² *State ex rel. Haffey v. Miller*, 4 Ohio St. 2d 29, 211 N.E.2d 830 (1965).

⁷³ *Avon Lake v. Burke*, 115 Ohio App. 541, 186 N.E.2d 94 (1962).

⁷⁴ *Loux v. Lakewood*, 120 Ohio App. 415, 193 N.E.2d 710 (1963), *appeal dismissed*, 176 Ohio St. 154, 198 N.E.2d 68 (1964).

ager to cause a suit to be commenced without special authorization by council.⁷⁵

IV. LOOKING AHEAD

What will be the burning issues of home rule in the decade to come? Certainly a law review article is not an appropriate vehicle for prophecy, but some speculation is justifiable in the study of municipal home rule. One issue likely to be raised again is the soundness of the rationale employed in *Petit v. Wagner*. If the supreme court continues to follow *Petit*, as it did in *Leavers v. Canton*, few innovative powers of local self-government will be available to non-charter municipalities and, consequently, charter adoptions will multiply at a more rapid rate than in the past. It is this writer's opinion that the high court will find it as convenient to depart from the theory of *Petit* as it was to create it, given the right factual context. The result of *Petit* in procedural civil service matters can be more rationally achieved by a "procedure-structure" theory under § 2 and *Morris v. Roseman* than it can under the variance concept articulated by Judge Peck.

How will home rule weather structural reforms in local government? Is municipal home rule an obstacle to reform in the structure of local government? Can the General Assembly, in light of municipal home rule, provide workable procedures for the merger, consolidation, detachment of territory, and dissolution of municipalities? Not all of these questions can be answered by reference to existing case law. In *Beachwood v. Board of Elections*⁷⁶ the supreme court upheld the validity of a detachment statute against the contention of the plaintiff village that detachment is a matter of local self government under § 3, article XVIII. Dean Jefferson B. Fordham in his article on home rule powers stated:

The whole province of annexation, disannexation, merger, consolidation and dissolution doubtless lies beyond the reach of home rule powers. The Home Rule Amendment is silent as to all of these matters. All but dissolution involve elements which transcend a particular municipality.

Provision for original incorporation is expressly left in state hands. Is not the question whether municipal existence will be continued also under state control? Home rule powers are granted to municipalities. It would seem that they presuppose continued existence and do not embrace self-destruction.⁷⁷

I agree with the conclusions of Dean Fordham. If the constitution provides an adequate procedure for county charters, home rule and alternative statutory forms, if the General Assembly faces up to consolidation,

⁷⁵ *Marysville v. Boerger*, 20 Ohio App. 2d 61, 251 N.E.2d 628 (1969).

⁷⁶ 167 Ohio St. 369, 148 N.E.2d 921 (1958).

⁷⁷ Fordham & Asher, *supra* note 2, at 69.

dissolution and annexation, and if the conclusions of Dean Fordham and this writer are correct, there is little likelihood that municipal home rule will obstruct or impede the reorganization of local governments. Lethargy among political and civic leaders, social stresses, the emergence of black power in central cities, and the vested interests of political parties and private groups are influences more persuasive in maintaining the status quo than is municipal home rule. Home rule is a viable doctrine, capable of changing with the times. It is clear under the existing cases that the will of the people of the state generally prevails over the will of the people of a particular municipality in important areas. Especially illustrative of state superiority are the following examples:

(1) The General Assembly may pass laws to limit the power of municipalities to levy taxes and incur debt for local purposes under § 13 of article XVIII. (This power is often exercised by the state.)

(2) The exercise of police powers by the state clearly prevails over conflicting police regulations by municipalities by virtue of the conflict clause of § 3, article XVIII.

(3) The state controls the form of government, structure, and procedure of non-charter municipalities under § 2, article XVIII.

(4) Section 3 "powers of local self government" is limited to the internal affairs of the municipality, as opposed to those matters of "state-wide concern" or "not purely local in nature," following such cases as *Bucyrus* and *Beachwood*.

(5) The variance concept under *Petit v. Wagner* relegates non-charter municipalities to the exercise of all powers of local self government in a manner not at variance with state law.

(6) The state has the authority to enact legislation affecting the welfare of its employees under § 34, article II, as held in the *Police and Fire Pension Fund* case.⁷⁸

(7) The state has control over incorporation under § 2, article XVIII, and probable control over matters involving annexation, detachment, merger, consolidation, and dissolution as suggested by Dean Fordham.⁷⁹

Surely no one having even a passing knowledge of these limitations on municipal home rule powers would seriously suggest that article XVIII materially impedes innovation in local government.

⁷⁸ State *ex rel.* Bd. of Trustees of Pension Fund v. Board of Trustees of Relief Fund, 12 Ohio St. 2d 105, 233 N.E.2d 135 (1967).

⁷⁹ Fordham & Asher, *supra* note 2.